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SUPREME COURT OF THE UNITED STATES

June Term—1945.

RICHARD ADOLPH ASCHER,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION AND BRIEF IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI

DENIS M. HURLEY,
Counsel for Petitioner.

220 EDWARD D. O'DONNELL, 21 Spruce Street, New York, N. Y.

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TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Richard A. Ascher respectfully shows to this Court:

A.

Summary Statement of the Matter Involved.

This action was commenced on February 12, 1943, under the provisions of section 15 of the Act of June 29, 1906, 34 Stat. 596, to cancel petitioner's certificate of citizenship granted in 1920. The District Court granted a decree revoking petitioner's citizenship for fraud and illegality (p. 59). The Circuit Court affirmed the finding of fraud, without passing upon the issue of illegality (63-66, 147 Fed. 2d 544).

The important issue presented upon this application is whether a man, who has lived in this country for the

past 39 years, should be deprived of his citizenship in the absence of direct or positive proof of fraud and upon the kind of indirect or circumstantial evidence adduced by the government which appears in this record.

The petitioner was born in Germany 59 years ago. He has lived in this country for 39 years. He is married and has an adopted son serving with the armed forces of the United States in China. He is presently engaged in the steel business in New York City (32, 35, 44). In 1920, he became a citizen (13). Twenty-three years later, by the judgment in this action, he has been deprived of his citizenship for claimed fraud and illegality in his application for naturalization, made in 1919. Why the government started action at this late date does not appear in this record; the facts were at all times available as matters of record. The petitioner seeks a review of the decree which cancelled his certificate of citizenship and enjoins him from all rights of citizenship (59-60).

It is conceded that on February 5, 1913, petitioner, a native and former citizen of Germany, made his declaration to become a citizen in the Eastern District Court of New York; that he filed his petition for naturalization on November 6, 1919, in the Supreme Court of the State of New York, County of Kings, and was admitted to citizenship on April 15, 1920.

During an examination conducted by a Naturalization Examiner twenty-two years later, on July 15, 1942, the petitioner testified that he had been arrested on August 27, 1913, for forgery in the second degree, that he had pleaded guilty to that charge and was sentenced to Elmira Reformatory for an indeterminate term; that he served eighteen months and was thereafter released on parole; that he was on parole for a period of six months, perhaps a year (13, 46). At that time, he was about 27 years old.

Before the examiner, in 1942, the petitioner, in answer to a question concerning the circumstances of the offense for which he was arrested on August 27, 1913, stated that

while working for Oliver Brothers, engaged in the hardware supply business, in New York City, he was charged with forging checks and converting the money to his own use. He was the assistant bookkeeper and the checks were given to him by the head bookkeeper to cash on the side; the head bookkeeper got seventy-five percent of the money and petitioner twenty-five percent. Ascher was not represented by attorney and no counsel was assigned to him. On the promise of a suspended sentence, he pleaded guilty as charged (28, 38, 39).

The complaint charged that the naturalization of the petitioner was fraudulently and illegally procured in that the testimony he gave on the preliminary examination by the Naturalization Examiner, in 1919, to the effect that he had not previously been convicted of crime, was wilfully and knowingly false; that the witness, A. Welles Stump, did not personally know the petitioner to have been a resident of the United States for a period of at least five years; and that the petitioner did not behave as a person of good moral character during the five year period required by law (3-6).

The government's bill of particulars alleged:

> "The examination conducted by the United States Naturalization Examiner, Samuel D. Levy, on November 6, 1919, was oral. *In answer to one of the questions put to him by the Naturalization Examiner* as to whether he was previously arrested and/or convicted of any violation of law, the defendant testified that he had no criminal record except that he was arrested for speeding and fined $25" (8).

The answer of the petitioner put in issue the government's allegations of fraud and illegality (6, 7).

There is no need on this application for any extended discussion of the applicable law. Petitioner has no quarrel with the general principles of law enunciated by the Trial

Court in its opinion and findings (45, 59). The Trial Court stated that an "action to set aside a certificate differs greatly from a proceeding to admit to citizenship, and, citizenship once granted cannot be set aside, except upon evidence which must be clear, unequivocal, and convincing. It cannot be set aside upon a bare preponderance of evidence, which leaves the issue in doubt" (49, 50, 58).

Not only should the evidence be clear, unequivocal and convincing, and "indeed overwhelming", but the facts and the law should be construed as far as is reasonably possible in favor of the defendant; "downright proof of fraud or illegality" is required; and the burden of proof is on the government (*Schneiderman* v. *United States*, 320 U. S. 118; *Baumgartner* v. *United States*, 322 U. S. 665; *Meyer* v. *United States*, 141 Fed. 2d 825, 827, 831).

The petitioner contends that the District Court not only failed to apply these basic principles to the facts in the case at bar but, on the contrary, resolved all rulings and construed all facts in favor of the government. At the conclusion of the trial, the issue remained in such a grave state of doubt as to clearly warrant a judgment for the petitioner.

The Circuit Court, without deciding whether the proof on the issue of illegality was sufficient to support the revocation of citizenship, "saying only that it appears to us to be quite finely drawn * * * ", decided that the evidence fully supported the finding of fraud. The Circuit Court, while admitting that there was no direct or positive evidence of fraud, nevertheless, concluded that there was ample evidence from which the fraud charged might be inferred (65).

B.

Jurisdiction.

The jurisdiction of this Court is invoked under sec. 240 (a) of the Judicial Code (28 U. S. C. A., sec. 347 [a]).

C.

The Questions Presented.

1. Was the government's evidence on the issue of fraud sufficient to support the revocation of petitioner's citizenship?

2. Was the government's evidence on the issue of illegality sufficient to support the revocation of petitioner's citizenship?

D.

The Reasons Relied on for the Allowance of the Writ.

The Circuit Court of Appeals has rendered a decision which is believed to be in direct conflict with the principles of law enunciated by this Court in *Schneiderman* v. *United States*, 320 U. S. 118, and in *Baumgartner* v. *United States*, 322 U. S. 665. While those cases involved freedom of thought as related to the oath of loyalty required of new citizens, the basic issue litigated, as in this case, was fraud. Like the *Schneiderman* and *Baumgartner* cases, this case raises important issues in the proper administration of the law affecting naturalized citizens and certiorari should be granted here for the same reasons as in those cases. If the decision of the Circuit Court should stand, it will mean not only that petitioner will be deprived of his citizenship twenty-three years subsequent to naturalization but that, after thirty-nine years of residence in the United States, he will be deported to Germany.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court, for its review

and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 114, October Term, 1944, *United States of America, Plaintiff-Appellee*, against *Richard Adolph Ascher, Defendant-Appellant*, and that said judgment of the United States Circuit Court of Appeals for the Second Circuit may be reviewed by this honorable Court, and that your petitioner may have such other and further relief in the premises as to this honorable Court may seem meet and just.

Dated: Brooklyn, New York, May 21, 1945.

RICHARD A. ASCHER,

By DENIS M. HURLEY,
Counsel for Petitioner.

EASTERN DISTRICT OF NEW YORK, }
COUNTY OF KINGS, } ss.:

I hereby certify that I have examined the foregoing petition for a writ of certiorari and that in my opinion it is well founded and the cause is one in which the petition should be granted.

DENIS M. HURLEY,
Counsel for Petitioner.

BRIEF IN SUPPORT OF APPLICATION FOR WRIT.

Opinions in the Courts Below.

The opinion of the District Court is printed at page 45, and the opinion of the Circuit Court reported in 147 Fed. 2d 544, is printed at page 64 of the record.

Jurisdiction.

The jurisdiction of this Court is invoked under sec. 240 (a) of the Judicial Code (28 U. S. C. A., sec. 347 [a]). The order for mandate herein was entered on March 1, 1945 (p. 66).

Statement of the Case.

This has been set forth generally in the foregoing petition. The specific facts are treated under the appropriate points of this brief.

Specification of Errors.

1. The Circuit Court erred in holding that the government's evidence on the issue of fraud was sufficient to support the revocation of petitioner's citizenship.

2. The Circuit Court erred in declining to decide that the government's evidence on the issue of illegality was insufficient to support the revocation of petitioner's citizenship.

Summary of Argument.

The government's evidence on the issues of fraud and illegality was not clear, unequivocal and convincing. On the main issue of fraud, the evidence was not positive or direct but wholly circumstantial. As the Circuit Court said in its opinion:

> "It is true that there was no positive evidence that the witness was asked specifically about his having been convicted, and being asked, denied it. But there is ample evidence from which it can be inferred * * *" (147 Fed. 2d 544, 545).

The evidence adduced by the government wholly fails to meet the test laid down in this type of case by this Court in *Schneiderman* v. *United States*, 320 U. S. 118; and in *Baumgartner* v. *United States*, 322 U. S. 665.

POINT I.

The government's evidence was insufficient, as matter of law, to support the finding of fraud.

As evidence of the claimed fraud, the government relied mainly upon a record of the United States Immigration and Naturalization Service, alleged to have been made in 1919, which was admitted in evidence over petitioner's objection (pltf.'s ex. 1, printed at pp. 11, 12, admitted p. 16). The record was supposed to be the original record of the preliminary examination of the petitioner (14). Why the petition for naturalization signed by petitioner, referred to in the complaint (3), and the rest of the records were not produced is nowhere explained.

Stitzer testified that he was Senior United States Naturalization Examiner, that he was familiar with the practice that obtained in the naturalization of citizens in

the year 1919. He said that Samuel D. Levy was in the Naturalization Service for only two years, from 1918 to 1920; that Levy is no longer connected with the Service. Stitzer also said that he did not know Levy's whereabouts and he did not know if any attempt had been made to locate Levy (p. 14). Apparently, no attempt was made to produce Levy at the trial. The only way Stitzer could attempt to connect the record with Levy was his belief that Levy's initials were typed in the corner; it was not signed or otherwise identified as having been made by Levy (15). Who did the typing, is not disclosed. Whether it was first written out by hand, or taken down by a stenographer, and later transcribed, is not revealed. There was no evidence that the record was in exactly the same condition in 1943 as it was in 1919.

The petitioner objected to the record as without proper foundation and as incompetent to prove any fact in issue (15). The record was offered in evidence to establish the charge of fraud to the effect that petitioner "testified under oath during an examination conducted by United States Naturalization Examiner Samuel D. Levy on November 6, 1919; that he had not been previously arrested for or convicted of any violation of law, * * *" (3-4). The record wholly fails to sustain this allegation.

Since this exhibit does not demonstrate either explicitly or through proper inference, that on November 6, 1919, the petitioner was specifically asked by Levy whether he had *ever* previously in his lifetime been convicted of any crime, and that petitioner falsely answered such question, the government has made out no case in fraud against petitioner.

Upon its face, the record does not show that petitioner was examined under oath or that he ever signed or swore to any testimony. It does appear from the subsequent examination, about twenty-two years later, on July 15, 1942 (pltf.'s ex. 2, pp. 39, 40), that petitioner was sworn before being examined in 1919, but who examined him or what specific inquiry was made by the Examiner does not

appear. No one vouches for the accuracy of the record. No one knows who typed it. There is no showing that petitioner ever had an opportunity to read it over or that he ever did so.

It does not appear from the record what particular questions the petitioner was asked at that time in November, 1919; it does not even purport to show on its face that any questions were asked. While it may be permissible to infer from the statements on the record that some questions were asked, it is not permissible to create an inference upon an inference. That second inference predicated on the first inference purports to infer precisely what the particular questions were which may have been asked. Nor is it permissible to infer that the answers were recorded with precision, since the record is not signed nor attested in any manner by the petitioner.

The District Court placed much reliance upon the fact that the initials "N C R" were testified by Stitzer to mean "No criminal record", and upon the statement "Arrested about one year ago for speeding and was fined $25" (12). But these statements are mutually contradictory. Also, they are far from being either competent or convincing evidence that petitioner swore, in 1919, "that he had not been previously arrested for or convicted of any violation of law" (4). For all that appears from the face of the record, any questions which might have been asked petitioner at that time could have been properly limited in point of time, under the statute, to the five year period, in which case the facts noted would be entirely true. For the petitioner, concededly, had no criminal record during those five statutory years with the exception of the conviction and fine for speeding about one year prior to November 6, 1919.

The District Court stated that it was "unreasonable to believe that the endorsement N.C.R. was placed on the report, unless the Examiner had asked the applicant whether he had *ever* been arrested, or convicted of any offense. *U. S.* v. *Eugene Ravone*, opinion of Bondy, J.,

U. S. D. C., S. D. N. Y., June 2nd, 1942, E-87-101" (47, italics ours). But the Trial Court overlooked the important fact that in the *Ravone* case the Examiner appeared at the trial as a witness and testified that he always asked a petitioner for naturalization whether he had *ever* been arrested or convicted of any offense. There is no such testimony by any Examiner in the case at bar.

Moreover, it does not seem on the face of this record that the petitioner's statements were recorded with any particular regard for accuracy, for example, the statement: "Made one trip to California *for three years* this year." (*sic*) states an impossibility and is manifest error (12). The petitioner might have said that his trip to California took three weeks or three months but upon the face of this record, the exact fact is not ascertainable. Since obvious error was made in some respects, other errors could very well have been made. Is fraud to be based upon such a poorly identified and erroneous record? Is this the evidence which the Circuit Court found to fully support the finding of fraud?

While it may be permissible to infer from this record that some questions may have been asked of petitioner by some unknown Examiner about convictions for crime, it is surely not permissible to go further and to infer from that inference that the petitioner was asked one very specific question, namely, whether he had *ever* been convicted of a crime in his lifetime. Under the statute then in force, the Examiner's questions could very properly have been limited to the five year statutory period involved. Is it now to be assumed, without proof, that the Examiner, in 1919, did not have the statutory period in mind?

To arrive at any finding of the ultimate fact of fraud pleaded in the complaint, upon the basis of this dubious and obviously incomplete record, it is necessary that inference be piled upon inference to an extent not sanctioned by law (*United States* v. *Ross*, 92 U. S. 281, 283; *Manning* v. *John Hancock Mut. Life Ins. Co.*, 100 U. S. 693; *People* v. *Scharf*, 217 N. Y. 204; *People* v. *Razezicz*, 206 N. Y.

249; *Ruppert* v. *Brooklyn Heights R. R. Co.*, 154 N. Y. 90; *People* v. *Harris*, 136 N. Y. 423).

The government attempted to show through Stitzer what the practice was in conducting examinations back in 1919 but, on objection, the question was withdrawn. In reply to a later question by the Court, the witness said that the notations on the record were arrived at "By question and answers". This was also objected to as calling for testimony as to what the custom was in 1919 (15-17). It is submitted that evidence as to custom is not proper in such a case as this, and that the petitioner, meeting a charge of fraud, is entitled to be confronted with the exact questions which he is claimed to have been asked and answered at the time, and confronted also by the person who is supposed to have done the questioning with the right of cross-examining that person. But Levy was not produced as a witness and, apparently, no effort was made to locate him (14). Additionally, evidence of the alleged custom would not prove precisely what questions were asked.

In any event, what specific questions may have been asked of petitioner on November 6, 1919, nowhere appear in this record. Until it is known precisely what questions were asked, and exactly what period of time was involved in the questions, no finding of fraudulent misrepresentation or concealment can be made. In a question involving the element of time, there is a radical difference between what happened in the past five years and what happened in a person's lifetime.

The statements contained in this record are more consistent with innocence than with fraud, if the statutory time factor be kept in mind, and, in the absence of any affirmative demonstration of fraud, the presumption of innocence must control (*Nichols* v. *Pinner*, 18 N. Y. 295, 300). Where two interpretations of a naturalization record are possible, the one reprehensible and a bar to naturalization, and the other innocent and in accord with the statutory time limitation, a court in a denaturalization

proceeding, we submit, is not justified in cancelling a certificate of naturalization, almost a quarter of a century old, by imputing the reprehensible interpretation to the record (12 R. C. L. sec. 172; *Lopez* v. *Campbell*, 163 N. Y. 340, 347; *Constant* v. *University of Rochester*, 133 N. Y. 640, 648).

On all of the evidence, it is respectfully submitted, the government did not even make out a case in fraud, let alone sustain its burden of proving positive fraud by clear, unequivocal and convincing evidence.

POINT II.

The government's evidence was insufficient, as matter of law, to support the finding of illegality.

The Circuit Court declined to pass on the sufficiency of the proof on the issue of illegality, "saying only that it appears to us to be quite finely drawn * * *" (p. 65).

That the standard of clear, unequivocal and convincing evidence had been reached on that issue was, therefore, seriously in doubt. That being so, the findings and the conclusion of the District Court on the issue of illegality should have been reversed, and the Circuit Court erred in failing to reverse them. Although that seems plain, in order that the entire argument on both of the issues litigated may be before this Court, and perhaps in an excess of caution on our part, we brief the point on the issue of illegality.

By section 4 of the Act of 1906 (34 Stat. 596), it was required that the facts of five years residence and of five years good behavior "be made to appear to the satisfaction of the court admitting any alien to citizenship * * *." This provision makes it incumbent upon the government in a denaturalization proceeding to establish affirmatively that such facts did not appear to the satisfaction of the

admitting court. There is no statutory provision with respect to the manner or the way in which the witnesses must know the applicant. That is left to judicial discretion in each particular case.

In the instant case, the government has wholly failed to prove that the Supreme Court of the State of New York, County of Kings, was not satisfied with the facts presented as to residence and behavior. In fact, there was absolutely no evidence offered by the government in this case as to the proceedings had before the New York Supreme Court in 1920 on the admission of this petitioner to citizenship. There was, therefore, no evidence upon which a finding of illegality might be predicated. The point made here was stressed in the concurring opinion of Mr. Justice Douglas in the *Schneiderman* case (320 U. S. 118, at p. 164). The reasoning of Mr. Justice Douglas applies squarely to the charge of illegality in the case at bar. For, in the absence of any evidence whatsoever as to what took place in the New York Supreme Court on petitioner's admission to citizenship, both the government and the Courts below were forced to rely upon mere surmise and conjecture as a basis for the claimed illegality.

In attempting to prove that petitioner's certificate of naturalization was obtained illegally in that one of the witnesses to his petition did not know him for the five year period prior to November 6, 1919, the government offered as one exhibit the stenographer's notes and the transcription of an examination of petitioner made on July 15, 1942, before Naturalization Examiner Gordon (pltf.'s ex. 2, admitted 19, printed 34). Petitioner objected to so much of that examination as pertained to matters subsequent to the date of petitioner's application for naturalization on November 6, 1919. The Court admitted the exhibit subject to petitioner's motion to strike out such parts of it as did not deal with facts within the time limited by the triable issues (18-19). Although no formal ruling was ever made on petitioner's motion to strike, it would seem that the District Court did not consider any

events subsequent to November 6, 1919, as they are not referred to either in the District Court's opinion or in its findings (45-59).

From certain parts of plaintiff's exhibit 2, the government sought to spell out its charge of illegality in that petitioner did not know Mr. Stump during the five year statutory period (41-42). In this connection, the complaint charges that petitioner admitted to Examiner Gordon, in 1942, that he was acquainted with Mr. Stump only "for a period of about two years" (4). This testimony of the petitioner contains no such categorical admission as claimed. Nor did the District Court make any such finding (51-59). In fact, the Court's finding of illegality was predicated upon an entirely different theory (48-58).

The petitioner testified, in 1942, that he could not recall how long before 1919 he had known Mr. Stump. He had an idea it was possibly a couple of years, it could have been more or less (41-42). As the petitioner said in answer to a previous question "After all, that's over 22 years ago" (41).

In contrast to the government's extremely meagre and easily explained evidence in this regard, Mr. Stump, an eminent member of the New York bar for almost half a century and a former public official of City and State, testified that he has known petitioner since the summer of 1913 (21-23, 26-28). Mr. Stump was present when petitioner was examined on July 15, 1942, and he noted petitioner's lapse of memory. Mr. Stump voiced no objection at the time. He testified that he intended to correct the testimony but that some subsequent talk "off the record" distracted his attention (22-24, 30-31).

Mrs. Ascher, the wife of petitioner, confirmed the fact that she and her husband first met Mr. Stump in 1913. She married the petitioner in England in 1911 (32). It is conceded that on February 5, 1913, petitioner made his Declaration of Intention to become a citizen (13). Mr. Stump testified that when petitioner first called at his law office in May or June, 1913, the petitioner asked if he could

later bring in his wife as he wished to get some information about naturalization, and then a month or so later, probably in July, Mrs. Ascher called with her husband and wanted to know if it was necessary for her also to file a notice of intention or whether she would become naturalized by virtue of her husband's naturalization (22, 24, 26).

It is respectfully submitted that the uncontradicted testimony of these witnesses is entirely credible and consistent, and that on this branch of the case, the government wholly failed to prove that petitioner did not have two qualified witnesses at the time he filed his petition for naturalization.

The petitioner was not called as a witness in his own behalf. He had already testified fully on this as well as on every other branch of the case in 1942 (34-45). His testimony on the trial could have added nothing to his previous testimony which was in evidence. Moreover, his credibility would have been subjected to attack because of his several convictions subsequent to his admission to citizenship (pltf.'s ex. 3, admitted 20, not printed). Without petitioner's testimony on the trial, such later convictions form no part of this record even though not formally stricken, and should not be considered. Should they be deemed in evidence, their admission constitutes reversible error. Although the Circuit Court made reference, in passing, to "proof here of later criminality" (64), such alleged proof was properly not made the basis of its decision. The petitioner has paid his debts to society for his offenses, and his convictions subsequent to acquiring citizenship afford no basis for denaturalization.

If the Trial Court would not believe the testimony of Mr. Stump and of Mrs. Ascher, there was no point in having the petitioner, in the face of his record, attempt to convince the Court. But the Trial Court did believe the testimony of these witnesses for the petitioner. The good faith and honesty of Mr. Stump were not questioned (49). The Trial Court held, however, that whether or not Stump

first met the petitioner in 1913 was of no importance (48-54).

On the contrary, we submit that the District Court thereby adopted too technical a viewpoint as to the qualifications of a witness on a naturalization. How harsh that viewpoint might become can readily be perceived. For, if in order to furnish a proper affidavit a witness must have actual, uninterrupted, day by day knowledge, through personal observation, of the applicant's residence and behavior for the full five year period, not many honest affidavits could be made. When a man swears that he has known another for say twenty-five years, and testifies to his residence and character during that period, does not everyone understand that there may have been periods of time during that twenty-five years, of greater or lesser duration, when the parties did not see each other? Yet here the District Court held, as a matter of law, that the fact that Stump did not see petitioner during the first eight or nine months of the five year period, even though he had met him at an earlier date, rendered him unqualified as a witness (50, 54, 56-57).

The Trial Court came to its strained conclusion despite the fact that there is here no dispute as to the fact of petitioner's residence in New York during the five year statutory period, and despite the fact that there is here no dispute as to the fact of petitioner's good behavior during that period of time. The only remaining question, therefore, is one of law, namely, whether petitioner's incarceration in Elmira Reformatory during a small fraction of the five year period means, as matter of law, that petitioner could not be deemed during that time to have behaved as a person of good moral character.

The complaint charges that petitioner "did not *behave* as a person of good moral character during the period required by law" (5). The petitioner submits that the fact of his conviction and sentence to Elmira Reformatory in 1913 is, in and of itself, not sufficient evidence to establish that he did not *behave* as a man of good moral

character during part of the five year statutory period prior to November 6, 1919; that such evidence is wholly inadequate to warrant the present cancellation of his certificate of naturalization. If the evidence in this record were before the Court on petitioner's application for naturalization, he could have been admitted to citizenship (*Petition of Zele*, 127 Fed. 2d 578; 140 Fed. 2d 773). There is also a real distinction recognized between convictions during the five year statutory period and convictions previous to that period (*U. S.* v. *Brass*, 37 Fed. Supp. 698).

The District Court held it to be of no moment that the place of confinement was Elmira Reformatory rather than a State prison (49, 57). We think that it was of the utmost importance and believe that the distinction and its importance in this case can be clearly demonstrated.

The question raised under the statute is whether the evidence establishes that during part of the five year statutory period, from November 7, 1914, to November 6, 1919, the petitioner did not *behave* as a man of good moral character.

The Trial Court recognized, as does the statute, that there is a marked distinction between "behavior" and "good character" (29). For, under the statute, one who prior to the statutory period had admittedly not been of good moral character, could, by *behaving* as a person of good moral character, during the five year period, comply perfectly with the statutory requirement. For example, we have an extreme case in the admission to citizenship of the notorious gunman and gangster, Owen Vincent Madden, better known as Owney Madden, on the recommendation of the United States Bureau of Naturalization, by Judge John E. Miller of the United States District Court, 8th Circuit, Western District of Arkansas, petition filed March 16, 1943, at Hot Springs, Arkansas. Otherwise, if good moral character were the sole criterion, instead of behavior, a man who had ever in his lifetime committed a crime or had ever been involved in a case of moral turpitude would be forever barred from citizenship.

It is plain that Congress intended to provide against any such hard and fast rule and unduly harsh result.

The petitioner's conviction, over six years previous to his application for citizenship, was not at the time of his naturalization a bar to his admission to citizenship under the statute. For under the statute as it then read, the requirement was that the Court be satisfied *"that during that time"* [five years], the petitioner "has behaved as a man of good moral character" (8 U. S. C. sec. 382). This provision was recast by the Act of March 2, 1929, 45 Stat. 1513-1514, 8 U. S. C. sec. 727 (a) (3) into substantially its present form to read as follows: "during all the periods * * * has been and still is a person of good moral character * * *."

Sentence to a reformatory and not a State prison had a very important bearing upon civil rights under the laws of the State of New York. At the time of petitioner's sentence in 1913, the laws of New York made, and still make, a real distinction between young first offenders and hardened criminals. The legislature made it perfectly plain that the former were to be accorded very different treatment from the latter and that the effects of their confinement were to be radically different and distinct. The history of Elmira Reformatory is found under section 280 *et seq.* of the Correction Law of New York, formerly the Prison Law.

The petitioner's sentence to the state reformatory at Elmira was in accordance with sec. 2185 of the Penal Law of New York (formerly Penal Code, sec. 700), which reads as follows:

> "A male between the ages of sixteen and thirty, convicted of a felony, who has not theretofore been convicted of a crime punishable by imprisonment in a state prison, may, in the discretion of the trial court, be sentenced to imprisonment in the New York state reformatory at Elmira, to be there confined under the provisions of law relating to that reformatory."

The results of a sentence to a reformatory differ drastically from the results of a sentence to state prison, for example:

> "A sentence of imprisonment in a *state prison* for any term less than for life, forfeits all the public offices, and suspends, during the term of the sentence, all the civil rights, and all private trusts, authority, or powers of, or held by the person sentenced." (Penal Law, sec. 510.)

On the other hand, a prisoner sentenced to Elmira Reformatory did not lose his citiezuship, even though he was subsequently transferred to a state prison (Op. N. Y. Atty-Gen. 1912 # 519). In 1933, the Attorney-General ruled that sec. 510 does not apply to felons committed to Elmira Reformatory (Op. N. Y. Atty-Gen. # 529).

If petitioner had been a citizen in 1913, he would not have lost his civil rights as a citizen by reason of his commitment to Elmira Reformatory. Under section 152 of the Election Law of New York, which provides in part as follows:

> "No person who has been convicted of a felony shall have the right to register for or vote at any election unless he shall have been pardoned and restored to the rights of citizenship,"

appears the following opinion of the Attorney General No. 559, rendered in 1912:

> "This section should be construed with Section 644 of the Penal Law, and a person sentenced to a reformatory is not disfranchised by subsequently being transferred to a State Prison."

Section 644 of the Penal Law was formerly as follows:

> "The prohibition to vote at an election contained in any statute of the State, shall not apply to a

> person heretofore or hereafter convicted of any crime, who has been sentenced or committed therefor to one of the houses of refuge or other *reformatories* organized under the statute of the State."

This section was amended and renumbered as section 510a by the Laws of 1939, Chapter 209, section 3:

> "No person who has been convicted of a felony shall have the right to register for or vote at any election, except as provided in Section 152 of the Election Law.
>
> The prohibition to vote at an election contained in any statute of the State shall not apply to a person heretofore or hereafter convicted of any crime, who has been sentenced or committed therefor to one of the houses of refuge, or other *reformatories* organized under the statute of the State."

This Court is familiar with those authorities, dealing with applications for citizenship, as contrasted with denaturalization proceedings, which hold that an alien convicted of a felony could not be admitted to citizenship unless he had received an unconditional pardon. Evidently, the Trial Court confused these different situations (53). A pardon would not have been necessary to restore this petitioner to any of his civil rights, if he were then a citizen. Having been sentenced by a criminal court having jurisdiction, in its discretion, as a first offender, to the reformatory at Elmira, petitioner, if he had then been a citizen, would not have lost his citizenship nor any of his civil rights. He was not regarded either by the legislature or the sentencing court as a person whose character was not subject to reformation. Nor have the federal courts taken a different view. For, on the issue of behavior as a man of good moral character, District Judge Chatfield of the Eastern District wrote:

> "But to return to the question of moral character. A person may be under indictment, may

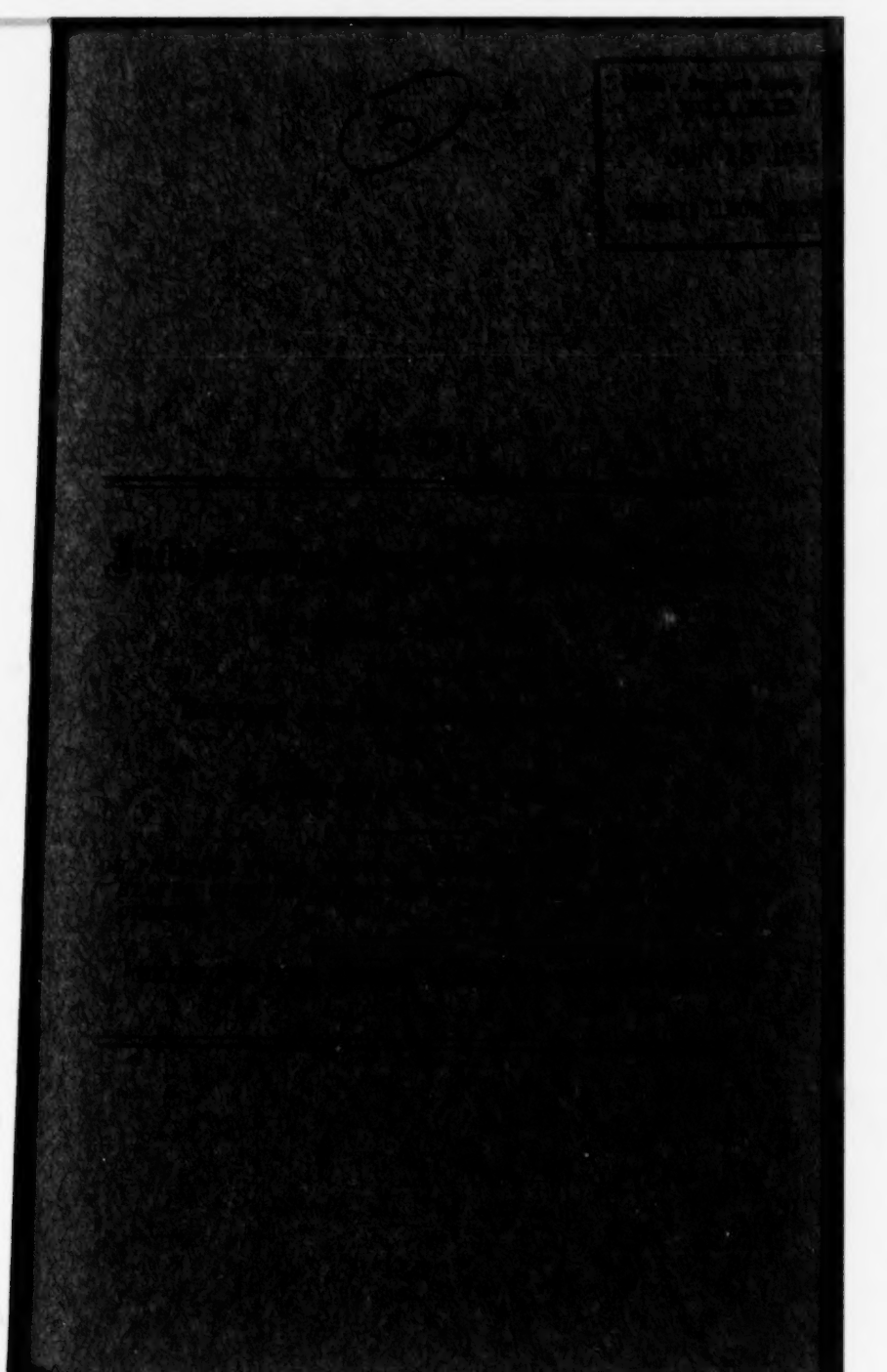
> plead guilty, may serve a sentence, and during this time so live that he could be considered to be of good moral character, if the sentence were for a crime of which repentance and rectitude of life could show a reformation of character."
>
> (*In re DiClerico*, 158 Fed. Rep. 905, 907.)

The very fact that the petitioner was sentenced by the Court of General Sessions to an indeterminate term in Elmira Reformatory, involving no loss of civil rights, is plain indication that the law of New York regarded the petitioner's crime as one for which repentance and rectitude of life could show a reformation of character. That petitioner was well behaved at Elmira is attested by the fact that he was released after serving only eighteen months of a 5 to 10 year indeterminate sentence.

Conclusion.

It is respectfully submitted that the petition for a Writ of Certiorari should be granted.

DENIS M. HURLEY,
Counsel for Petitioner.



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CITATIONS

649552—45——1

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1314

RICHARD ADOLPH ASCHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 63–65) is reported at 147 F. 2d 544. The opinion and the findings of fact and conclusions of law of the district court (R. 45–59) are not reported.

JURISDICTION

The judgment of the circuit court of appeals was entered March 1, 1945 (R. 66). The petition for a writ of certiorari was filed May 26, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the evidence is sufficient to support the judgment of the district court revoking petitioner's naturalization on the grounds that it had been fraudulently and illegally procured.

STATUTES INVOLVED

Section 338 of the Nationality Act of 1940, c. 876, 54 Stat. 1137, 1158, 8 U. S. C. 738, provides in part:

> (a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings * * * for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured.

Section 4 of the Act of June 29, 1906, c. 3592, 34 Stat. 596, 598, formerly 8 U. S. C. 382 (1926 ed.), which was in force at the time of petitioner's naturalization, provided in part:

> It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he has resided continuously within the United States five years at least, and within the State or Territory where such court is at the time held one year at least, and that during that time

> he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. In addition to the oath of the applicant, the testimony of at least two witnesses, citizens of the United States, as to the facts of residence, moral character, and attachment to the principles of the Constitution shall be required, and the name, place of residence, and occupation of each witness shall be set forth in the record.

STATEMENT

Proceeding under Section 338 of the Nationality Act of 1940, the United States Attorney for the Eastern District of New York on February 1, 1943, brought suit in the District Court for his district to cancel the certificate of naturalization issued to petitioner, a native of Germany, by the Supreme Court of New York, Kings County, on April 15, 1920. The complaint charged that the certificate had been procured fraudulently and illegally. It was alleged that petitioner's testimony under oath at a hearing before a naturalization examiner on November 6, 1919, that he had not been previously arrested for or convicted of any violation of law other than speeding, was wilfully and knowingly false; that A. Wells Stump, one of the witnesses to his petition for naturalization, was not competent for that purpose; and that he had not behaved as a person of good

moral character during the five year period preceding the filing of his petition for naturalization. (R. 3–6.) In his answer, petitioner denied these charges, but conceded, as alleged in the complaint (R. 4), that at an examination before a naturalization examiner in 1942 he admitted that he had been arrested and convicted of forgery in New York in 1913, as a result of which he served eighteen months in a reformatory and was thereafter released on parole, and also that he had told this examiner that he had known Stump for about two years, "thereby intending to convey that he had known said A. Wells Stump from a date about two years prior to 1915" (R. 6–7). Petitioner also alleged that at his examination on November 6, 1919, he stated to the examiner that during the five years prior thereto he had been arrested only for speeding, for which he was fined $25 (R. 7).

The evidence adduced at the trial may be summarized as follows:

Petitioner was born in Germany in 1886 and came to the United States in May 1906. On February 5, 1913, he filed a declaration of intention to become a citizen, and on November 6, 1919, he filed a petition for naturalization in the Supreme Court of New York, Kings County. That court issued him a certificate of naturalization on April 15, 1920. (R. 13, 35.)

On November 6, 1919, the same day petitioner filed his petition, he was examined under oath by

Samuel D. Levy, a naturalization examiner (R. 39–40). Levy did not testify at the trial below, since he had severed his connection with the Naturalization Service in 1920, and his whereabouts were unknown (R. 14). Over petitioner's objection, there was received in evidence a document called an "Admittance Slip" (R. 16), identified by one Stitzer, an official of the Naturalization Service since 1908, as a record of Levy's examination of petitioner on November 6, 1919, which Stitzer testified had been "kept in the files" of the Service in the regular course of business (R. 11–12, 14–16). On this document there appeared the notation "NCR," and below it a statement that petitioner had been "Arrested about 1 year ago for speeding and was fined $25" (R. 12). Stitzer testified that the letters NCR meant that the applicant for citizenship had no criminal record, and that the naturalization examiner obtained such information by questioning the applicant (R. 17). It was admitted that petitioner had, in fact, been convicted of second degree forgery in the Court of General Sessions of the County of New York on September 3, 1913, and sentenced to an indeterminate term of imprisonment, and that he served 18 months in the state reformatory and about six months on parole after his release (R. 13, 36–37). At an examination of petitioner before a naturalization examiner in July 1942, a transcript of which was introduced by the Government (R. 19, 34–35), petitioner testified that at

his examination in 1919 he possibly did tell the examiner of his arrest and fine for speeding, but that he did not disclose the forgery conviction and sentence or his imprisonment therefor, for the reason that the examiner did not question him as to his criminal record (R. 40–41).

At the 1942 examination, petitioner also testified that he had known Stump, one of the witnesses to his petition for naturalization, "a couple of years," more or less, prior to November 6, 1919, when he applied for naturalization (R. 41).

Stump and petitioner's wife testified in petitioner's behalf. Stump stated that he first met petitioner in May 1913 and saw him again in July of that year, but that he did not see petitioner again until July 1915, after which time he saw him once or twice each week (R. 22–24, 26, 27–28, 31). Stump also testified that when petitioner applied for citizenship in 1919, he did not know that petitioner had been in jail in 1913 and 1914 (R. 28, 30). Petitioner's wife testified that she and her husband first met Stump in 1913 (R. 32).

The district court filed a memorandum opinion (R. 45–51), and findings of fact and conclusions of law (R. 51–59). The court concluded, *inter alia,* that the evidence was clear, unequivocal and convincing that petitioner deliberately and intentionally concealed the fact of his forgery convic-

tion on his examination before Levy on November 6, 1919, and, therefore, that his naturalization was fraudulently procured; and also that the evidence was clear, unequivocal and convincing that Stump was not a qualified witness to petitioner's naturalization in that he was unable to verify continuous residence by petitioner, as required by law, or that petitioner had been a person of good moral character during the five years preceding the filing of the petition for naturalization, and, therefore, that petitioner's naturalization was illegally procured (R. 58). Accordingly, the court entered a decree setting aside the order admitting petitioner to citizenship and canceling his certificate of naturalization (R. 59–60).

On appeal to the Circuit Court of Appeals for the Second Circuit, the judgment was affirmed (R. 66). The court pretermitted the issue of illegality in the procurement of petitioner's naturalization, holding that the proof established that he had fraudulently concealed from the examiner in 1919 the fact that he had been convicted of forgery (R. 63–65).

ARGUMENT

Relying upon *Schneiderman* v. *United States*, 320 U. S. 118, and *Baumgartner* v. *United States*, 322 U. S. 665, petitioner's sole contention (Pet. 5, 8–22) is that the evidence is insufficient to support the findings that his naturalization had been fraudulently and illegally procured. We

submit, however, that the proof fully satisfied the exacting standard laid down in those decisions.

1. The ultimate finding of the district court on the question of fraud was that petitioner had deliberately concealed his prior conviction of a felony on his preliminary examination in 1919 and that his purpose in doing so was to obtain citizenship (Finding 29, R. 54). It is settled that naturalization will be revoked on the ground of fraud where the applicant concealed his past criminal record, since such concealment serves to prevent a full inquiry as to whether he behaved as a person of good moral character during the five year period preceding the filing of his petition. *United States* v. *De Francis*, 50 F. 2d 497, 498 (App. D. C.); *United States* v. *Saracino*, 43 F. 2d 76 (C. C. A. 3); *Gaglione* v. *United States*, 35 F. 2d 496 (C. C. A. 1), certiorari denied, 281 U. S. 721; *United States* v. *Mancini*, 29 F. Supp. 44 (M. D. Pa.); *United States* v. *Etheridge*, 41 F. 2d 762 (D. Ore.); cf. *Rein* v. *United States*, 69 F. 2d 206 (C. C. A. 3).

Although admitting that he was questioned by the examiner on his preliminary examination and that he failed to disclose the forgery conviction and sentence, and even that the record of his preliminary examination affords a basis for an inference that he was asked some questions concerning convictions for crime, petitioner argues that the notation "NCR" appearing in that record

and the further statement that he had been arrested and fined for speeding about one year prior to his examination, do not support an inference that he was asked specifically whether "he had *ever*[1] been convicted of a crime in his lifetime," because under the statute the examiner's questions in this regard could have been limited in point of time to the five year period preceding the filing of his petition. Since his conviction of forgery actually occurred more than five years prior to that time, he contends that there was no clear and convincing proof that he deliberately concealed the fact of his conviction from the examiner. (Pet. 8–13.) This contention, we submit, represents a highly artificial and improbable interpretation of the evidence. The obvious and logical inference to be drawn from the notation that petitioner had no criminal record and the affirmative statement that he had been arrested and fined for speeding, is that the examiner questioned him generally, without regard to time, as to whether he had a criminal record and that, with the exception noted, petitioner replied in the negative. This inference is further supported by the consideration that even though an applicant has not been convicted of crime during the five years preceding his petition, his criminal record beyond that period is directly relevant to

[1] Italics as in the petition for certiorari, p. 11.

the determination of his moral character during the period. *In re Taran*, 52 F. Supp. 535, 539-540 (D. Minn.); *In re Caroni*, 13 F. 2d 954 (N. D. Calif.); *In re Ross*, 188 Fed. 685 (M. D. Pa.).

Furthermore, during the first four months of the five year period preceding the filing of his petition for naturalization, which commenced November 6, 1914, petitioner was actually incarcerated under the judgment of conviction for forgery, and for at least the next six months, or until September 3, 1915, he was under parole restraint (R. 53; see p. 5, *supra*). As the notation "NCR" plainly indicates, the examination in this regard was concerned with whether petitioner had a criminal record. Hence, even if it be assumed that the examiner's questions were limited to the five year period, petitioner is in no better position. For his imprisonment and parole manifestly constituted part of his criminal record, and he would have been bound, even under such limited questioning, to disclose those facts.

2. Petitioner also contends (Pet. 13–17) that the evidence is insufficient to support the revocation of his naturalization on the ground that it had been illegally procured. The court below did not pass upon this question, stating that the proof "appears to us to be quite finely drawn" (R. 65). We think that the proof on this issue is sufficient and that the court's remark was an inadvertence based upon the erroneous assump-

tions that it had been conceded that the witness Stump knew petitioner for more than five years prior to the filing of the petition for naturalization and that the illegality charged and found consisted of the fact that Stump was not qualified merely because he did not know that petitioner had been incarcerated during the early part of that period.

The statute, pp. 2–3, *supra,* prescribed as conditions for naturalization, *inter alia,* that the applicant's good moral character and continuous residence in the United States during the preceding five years be verified by the testimony of at least two witnesses. Naturalization procured without fulfilling the prescribed conditions may be revoked on the ground that it was illegally obtained. *United States* v. *Ginsberg,* 243 U. S. 472, 475; *United States* v. *Beda,* 118 F. 2d 458 (C. C. A. 2); *Schwinn* v. *United States,* 112 F. 2d 74 (C. C. C. 9), affirmed, 311 U. S. 616; cf. *Baumgartner* v. *United States,* 322 U. S. 665, 675. While a witness is not disqualified merely because he has not observed the applicant on each day during the five year period (*In re Reichenburg,* 238 Fed. 859 (M. D. Pa.)), it has been held that if he had no opportunity to know the applicant's behavior during a continuous period of six months within the five year period, he is not qualified as a witness. *In re Zenzola,* 43 F. 2d 648, 650 (E. D. Mich.).

The district court's conclusion that petitioner's naturalization had been illegally obtained was based upon its finding that Stump was not qualified to testify as to petitioner's residence and good moral character during the whole of the critical five year period (R. 54–55, 56–57, 58). Stump testified at the trial below that he saw petitioner twice in the middle of 1913 and then did not see him again until July 1915 (p. 6, *supra*). Petitioner was in the reformatory from September 1913 until March 1915, and he was on parole until at least September 1915. Stump testified that he had no knowledge of these facts until after he had appeared as a witness to petitioner's application for naturalization (R. 28). A requisite of Stump's qualification as a witness was that he must have known of petitioner's moral character and continuous residence in this country from November 6, 1914, to November 6, 1919, the five years preceding the application. However, his acquaintance with petitioner did not really begin until July 1915, and, therefore, extended over a period considerably less than the required five years. But even if it began in 1913, it was interrupted at least from September 1913 to March 1915, when petitioner was in the reformatory, a fact which did not come to Stump's attention until after he had vouched for petitioner's good moral character on November 6, 1919. It is thus clear that on any view of the

evidence, Stump was not qualified to testify that petitioner had resided continuously in the United States and behaved as a person of good moral character during the whole of the five years preceding his petition for naturalization.

Petitioner's argument to the contrary is, we submit, without merit. He urges (Pet. 17) that the mere fact that Stump did not see him during the first eight or nine months of the five year period, did not disqualify Stump as a witness, in view of the fact that he had met Stump earlier. But since the earlier acquaintance consisted of but two meetings with petitioner in 1913, followed by a complete absence of further contact for two years, the only conclusion that can be drawn was the one made by the district court, i. e., that Stump first became sufficiently well acquainted with petitioner to testify to his moral character and residence in 1915 at the earliest (Finding 36; R. 55).

Petitioner also argues (Pet. 17–22) that the fact that he was imprisoned in a reformatory during the early part of the five year period does not of itself prove that he was not a person of good moral character during the period of his imprisonment and that Stump was therefore not disqualified merely because he did not know of petitioner's imprisonment. The argument rests upon a misconception of the district court's findings and conclusions. The court's finding that Stump was

not sufficiently well acquainted with petitioner to testify as to his moral character and residence during the whole of the five year period was based upon the subsidiary findings that Stump did not see petitioner from June 1913 until July or August 1915 and did not even know that petitioner had been imprisoned during part of that time (R. 54–55). In its conclusions of law on this matter, and also in its opinion, the court did hold that petitioner could not be deemed to have behaved as a person of good moral character within the contemplation of the naturalization law during the periods of his imprisonment and parole and that therefore Stump could not have verified that petitioner was qualified in this respect during the whole of the five year period even if he had known of the imprisonment and parole. But in other respects the opinion and conclusions follow the pattern of the findings, i. e., that Stump had not seen or heard of petitioner during a substantial portion of the five year period and was for that reason alone not a qualified witness. (R. 48–49, 56–57). In any event, as the district court pointed out in its opinion and conclusions (R. 49, 57), imprisonment or parole for a felony during part of the five year period disqualifies a person from presently procuring citizenship, and, by the same token, a witness who knows of such facts, since good behavior under such compulsion

is not the type of behavior contemplated by the statute. *In re McNeil,* 14 F. Supp. 394 (N. D. Calif.).[2]

CONCLUSION

The evidence is under the applicable standards sufficient to support the judgment revoking petitioner's naturalization. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
TOM C. CLARK,
Assistant Attorney General.
ROBERT S. ERDAHL,
LEON ULMAN,
Attorneys.

JUNE 1945.

[2] The dictum from *In re Di Clerico*, 158 Fed. 905, 907 (E. D. N. Y.), quoted by petitioner (Pet. 21–22), is not to the contrary, for it is not clear from that opinion whether the court was speaking of imprisonment before or during the five year period. Moreover, the court stated that a disqualification on the ground that the applicant has committed a crime could not be removed and the statutory period commence to run until the opportunity arises to observe whether the applicant has repented and undergone a reformation of character. On that basis the court denied the petitioner's application for leave to file a petition for naturalization until the lapse of five years from the date he had ceased to use a certificate of naturalization which he had previously procured illegally. Thus, the holding of the case is entirely consistent with the *McNeil* decision, *supra*, and the alternative basis of the district court's decision in respect of Stump's qualification as a witness.

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